

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MAURO PENNISI, INC.	:	DETERMINATION
	:	DTA NO. 818904
for Revision of a Determination or for Refund of	:	
Cigarette Tax under Article 20 of the Tax Law and	:	
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Year 1996.	:	

Petitioner, Mauro Pennisi, Inc., c/o Salvatore Pennisi, 78 West Hoffman Avenue, Lindenhurst, New York 11757, filed a petition for revision of a determination or for refund of cigarette tax under Article 20 of the Tax Law and Sales and Use taxes under Articles 28 and 29 of the Tax Law for the year 1996.

A small claims hearing was held before Thomas C. Sacca, Presiding Officer, at the offices of the Division of Tax Appeals, State Office Building, Veterans Memorial Highway, Hauppauge, New York, on January 30, 2003 at 1:15 P.M., which date began the three-month period for the issuance of this determination. Petitioner appeared by Salvatore Pennisi, vice-president. The Division of Taxation appeared by Barbara G. Billet, Esq. (Mary Fontaine).

ISSUE

Whether petitioner filed a timely claim for refund of cigarette tax and prepaid sales tax.

FINDINGS OF FACT

1. Petitioner, Mauro Pennisi, Inc., located at 78 West Hoffman Avenue, Lindenhurst, New York, is a licensed New York State cigarette tax stamping agent. During the period at issue, Salvatore Pennisi was its vice-president and Mary Pennisi its secretary-treasurer.

2. Lorillard Tobacco Company (“Lorillard”), 200 Kentuck Road, Danville, Virginia, is a manufacturer of cigarettes. On December 6, 1996, Lorillard issued to petitioner a Manufacturers Statement which indicated that it had received from petitioner 3,620 packages of unsaleable cigarettes on November 25, 1996. The statement indicated that the New York State stamps or meter impressions which had previously been affixed to the packages of cigarettes returned had been destroyed. At the time of purchase of the packages of cigarettes, petitioner had paid on each package a cigarette tax of 56 cents and prepaid sales tax of 15 cents.

3. On April 9, 2001, petitioner submitted to the Transaction and Transfer Tax Bureau (“TTTB”) of the Division of Taxation (“Division”) a Claim for Redemption/Refund of Cigarette Tax Stamps and Prepaid Sales Tax, Form CG-114. The claim requested a total refund of \$2,564.88, consisting of cigarette tax of \$2,021.88 and a prepaid sales tax of \$543.00, relating to the cigarette packages returned to Lorillard. The refund claim form was accompanied by the manufacturers statement from Lorillard indicating the destruction of the 3,620 packages of cigarettes along with the affixed New York State stamps or meter impressions.

4. At the time that the manufacturers statement was received by petitioner, Mary Pennisi was responsible for the filing of the refund claims with the TTTB. Shortly after the manufacturers statement was sent to petitioner, Mary Pennisi suffered a heart attack and underwent by-pass heart surgery. As a result of Ms. Pennisi’s illness, Salvatore Pennisi took over the responsibility of filing the refund claims. However, during the transition period, the

manufacturers statement was misplaced in petitioner's office, and was not located until April 2001.

5. On April 17, 2001, the TTTB issued to petitioner a letter denying the refund claim of \$2,564.88. The denial letter indicated that the refunds were being denied because the claim had been filed more than two years after the cigarette tax had been paid and more than three years after the prepaid sales tax had been paid.

CONCLUSIONS OF LAW

A. Section 476 of the Tax Law provides, in relevant part, as follows:

Whenever any cigarettes upon which stamps have been placed . . . have been sold or shipped into another state for sale or use there or have become unfit for use and consumption or unsaleable, or have been destroyed . . . , the agent, dealer or tobacco products distributor, as the case may be, shall be entitled to a refund of the actual amount of tax so paid, provided application therefor is filed with the commissioner of taxation and finance within two years after the stamps were affixed to such cigarettes

B. Section 1121(d) of the Tax Law provides, in relevant part, as follows:

Export, destruction, tax paid in error. Whenever any cigarettes upon which the prepaid tax imposed by section eleven hundred three of this article has been paid have been sold and shipped to another state for sale or use there or have become unfit for use or unsaleable, or have been destroyed . . . , the agent or dealer, as the case may be, shall be entitled to a refund or credit of the actual amount of prepaid tax so paid with respect to cigarettes which will not be possessed for sale or use in this state.

Section 1139(a) of the Tax Law provides that claims for credit or refund must be filed with the Commissioner of Taxation and Finance within three years from the date that the tax was payable by the person required to collect the tax.

C. Petitioner concedes that the refund claim was filed beyond the two-year statute of limitations provided by Tax Law § 476 relating to the cigarette tax and the three-year statute of limitations provided by Tax Law § 1139(c) relating to the prepaid sales tax. Unfortunately for

petitioner, there is no provision in the Tax Law which would allow the extension of the statute of limitations due to the illness of the individual responsible for the filing of the refund claims with the TTTB. Regrettably, it must be determined that petitioner failed to file the refund claim within the applicable time periods, and the Division properly denied the refund claim as untimely.

D. The petition of Mauro Pennisi, Inc. is denied, and the denial of petitioner's refund claim by the Division of Taxation is sustained.

DATED: Troy, New York
March 6, 2003

/s/ Thomas C. Sacca
PRESIDING OFFICER